IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 693 OF 2003.

Anant Bhausaheb Dhure. ... Appellant.

Versus.

Sadashiv Dhondiba Kate & anr. ... Respondents.

Shri A.A.Garge for the Appellant.

Shri Amit B.Borkar for the Respondents.

CORAM : ABHAY S.OKA, J.

DATED : 13th April, 2006.

P.C.:

1. Heard the learned Advocate appearing for the Appellant. The Appeal is by the original Defendant No.1. The Respondent No.1 is the original Plaintiff who filed a suit for removal of encroachment and injunction. The trial Court recorded a categorical finding that the Respondent No.1 was the owner of the suit property. However, the suit was dismissed on the ground that the encroachment was not proved. An appeal was preferred by the original Plaintiff. During the pendency of the Appeal an application was made for appointment of a Court Commissioner. Accordingly TILR was appointed as the Court Commissioner and an application was made under Order XLI Rule 27 of the Code of Civil Procedure, 1908 for examining the Court Commissioner. Accordingly permission was granted to the Respondent No.1 to examine the Court Commissioner. The Court Commissioner was

cross-examined by the present Appellant. The Court Commissioner found that there was an encroachment to the extent of 27 sq.meters made by the Appellant on the suit property which is owned by the Respondent No.1. Accordingly a decree for removal of encroachment has been passed against the Appellant and as the Appellant was found to have committed an act of encroachment, a decree for perpetual injunction was passed for protecting the possession of the Respondent No.1 over the suit property of which he is the owner.

2. Shri Garge appearing for the Appellant submitted that without there being any pleadings, a decree for removal of encroachment has been passed. He submitted that the encroachment was not proved.

3. I have considered the submissions. Prayer was already made in the suit for removal of encroachment. In the appeal the Court Commissioner was appointed who was a competent Survey Officer under the Maharashtra Land Revenue Code, 1966. After carrying out the survey and after fixing the boundaries of the property of Respondent No.1, he found that the Appellant had committed encroachment to the extent of 27 sq.meters. The Appellate Court has considered the oral evidence of the Court Commissioner and has accepted his evidence. The finding of the Appellate Court as regards the

encroachment is based on appreciation of oral and documentary evidence and hence no interference is called for.

4. It must be noted here that the Appellant argued before the Appellate Court in the alternative that he has perfected his title to the encroached portion by adverse possession and a point for determination to that effect has been framed. The Appellate Court recorded a finding that the Appellant has failed to prove plea of adverse possession.

5. There are concurrent findings of both the Courts below that the Respondent No.1 is the owner of the property in question. No substantial question of law arises. The Second Appeal is dismissed.

Judge.